Office-Supreme Court, U.S.
FILED
JUN 26 1963
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 239

FRANKFORT OIL COMPANY, a Division of Joseph E. Seagram & Sons, Inc., an Indiana corporation,
Petitioner,

VERSUS

E. S. HEYSER, JR., OPAL MARTIN, OPAL MARTIN, Guardian of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, Minors; ANDREA PAULINE MARTIN, MAUDIE DEAN MARTIN and ODIE D. MARTIN, and JOHN B. BAUMERT, Guardian Ad Litem of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, Minors,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

LOUIS A. FISCHL,
P. O. Box 1766,
Ardmore, Oklahoma,
Attorney for Petitioner.

Of Counsel for Petitioner:
ELDON E. SCOTT,
P. O. Box 747,
Dallas 21, Texas;
JOSEPH M. CULP,
P. O. Box 1766,
Ardmore, Oklahoma;
F. LOVELL McMILLIN,
P. O. Box 1766,
Ardmore, Oklahoma.

June, 1963.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8780

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	5
Reasons for Granting the Writ	7
Conclusion	10

CITATIONS

CASES:

Aldridge v. Houston Oil Co., 116 Okla. 281, 244 Pac. 782	7
Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199	10
Busby v. Pierson, 128 So.2d 516 (Ala.)	4
Byrd v. Blue Ridge Rural Electric Co-op, Inc., 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed.2d 953	10
Carter v. Rector, 88 Okla. 12, 240 Pac. 1035	8
Dixon v. Mapes, 181 Okla. 376, 73 P.2d 1131	8
Ellison v. Skelly Oil Co., 206 Okla. 496, 244 P.2d 832	7
Farmers Exchange Bank of Lindsay v. Cutler, 122 Okla. 255, 254 Pac. 95	8
First National Bank of Healdton v. Dunlap, 122 Okla. 288, 254 Pac. 729, 52 A.L.R. 126	7

CASES (Continued)

Page

Kinsey, Caroline M. v. City of Hammond, 491 P.2d 304, 41 Ill. Dec. 1005 10

Knickmeyer v. Mortgage Co., Inc., 196 Okla. 14, 161 P.2d 486 6

Lockhart's Estate, In re, 122 Okla. 28, 254 Pac. 490 ..... 4, 5

Longfield Oil Co. v. Champlin, 73 Okla. 51, 180 Pac. 514 6

Harris v. Brady, 136 Okla. 276, 277 Pac. 373 4

Hennessee v. Magnolia Petroleum Co., 174 Okla. 124, 50 P.2d 824 ..... 4—

Hensley v. Maxwell, 172 Okla. 2, 44 P.2d 681 4

Hixson, et al. v. Cook, et al., 276 P.2d 677, Okla. 4

Lusk v. Cardin Oil Company of Texas, 172 Okla. 508, 45 P.2d 656 ..... 4, 5

Meeker v. Ambassador Oil Co., 308 F.2d 875 (10th Cir.) 6

Mercer v. Mercer, 365 P.2d 554 (Okla.) 4, 5

Rockwood v. St. John's Estate, 69 Okla. 47, 92 Pac. 277 6

Shaller's Estate, In re, 268 P.2d 623 (Okla.) 5

Strawn v. Brady, 84 Okla. 68, 202 Pac. 505 5

Yost v. Cassell, 208 Okla. 330, 255 P.2d 934 4

STATUTES AND TEXT BOOKS

Oklahoma Constitution, Art. 12, Sec. 1 ..... 3, 7, 8, 9

58 O.S.A. 311, as amended by Laws of 1947, p. 345, Sec. 1, and Laws of 1953, p. 239, Sec. 19 ..... 3, 4, 5

84 O.S.A. 213 (first) 3, 4, 5

28 U.S.C. 1254 2

28 U.S.C. 1332 2

26 Am. Jur., Sec. 168, p. 106 4

INDEX CONTINUED PAGE

Summers' Oil & Gas, Vol. 1-A, Sec. 136, beginning, page 281 7

West's Oklahoma Digest, Vol. 7-A, Title Homestead, Key Nos. 134 to 153, incl. 10

APPENDIX

Appendix A:

Opinion of United States Court of Appeals, Tenth Circuit, filed April 22, 1963 I-VII

In the
Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

FRANKFORT OIL COMPANY, a Division of Joseph E. Seagram & Sons, Inc., an Indiana corporation,
Petitioner,

VERSUS

E. S. HEYSER, JR.; OPAL MARTIN, OPAL MARTIN, Guardian of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, Minors; ANDREA PAULINE MARTIN, MAUDIE DEAN MARTIN and ODIE D. MARTIN, and JOHN B. BAUMERT, Guardian Ad Litem of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, Minors,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States of America:

The petitioner, Frankfort Oil Company, a Division of Joseph E. Seagrams & Sons, Inc., an Indiana corporation, prays that a writ of certiorari issue to review an opinion of the United States Court of Appeals Tenth Circuit.

OPINIONS BELOW

The judgment of the District Court of the United States for the Eastern District of Oklahoma was rendered June 14, 1962. It is not reported (R. 40-46). The opinion of the United States Court of Appeals Tenth Circuit was rendered April 22, 1963. It is reported in 316 F.2d 441 (App. A, *infra.*, pp. i to vii). Petition for rehearing was denied May 24, 1963 (Tr. 6). On June 3, 1963, an order was entered staying mandate of the Court of Appeals pending the filing of this petition for writ of *certiorari* in this Court (Tr. 6).

JURISDICTION

Jurisdiction of the District Court was based on diversity of citizenship and requisite jurisdictional amount. 28 U.S.C. 1332. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

The validity and coverage of an oil and gas lease on a probate homestead executed by the surviving widow of the deceased husband and father, in whom the record title to the homestead land was vested at the time of his death, as against an oil and gas lease covering the probate homestead executed by a guardian of the minor children of the deceased.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of Article 12, Section 1, of the Constitution of the State of Oklahoma (homestead provision of the Constitution), Title 58, Oklahoma Statutes Annotated, Section 311, as amended by Laws of 1947, p. 345, Section 1 and Laws of 1953, p. 239, Section 19 (probate homestead statute), and 84 Oklahoma Statutes Annotated, Section 213, subdivision first (statute on descent and distribution).

Article 12, Section 1, of the Oklahoma Constitution is as follows:

> "The homestead of any family in this State, not within any city, town, or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, That the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; And Provided Further, That in case said homestead is used for both resident and business purposes, the homestead interest therein shall not exceed in value the sum of five thousand dollars: Provided, That nothing in the laws of the United States or any treaties with the Indian Tribes in the State, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the State: *And Provided Further, That any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired.*" (Emphasis supplied)

Title 58, Oklahoma Statutes Annotated, Section 311, as amended by Laws of 1947, p. 345, Section 1, as amended by Laws of 1953, p. 239, Section 19, as far as pertinent here, is as follows:

> "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead, which shall not in any event be subject to administration proceedings, *except as in this title provided,* until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age. *The title to the land set apart for the homestead property shall pass, subject to the right of homestead, the same as other property of the decedent and shall be included in the decree of distribution.*"

The italicized portions of the statute were inserted by the 1953 Amendment. In *Hixson, et al.* v. *Cook, et al.*, 379 P.2d 677, the Supreme Court of Oklahoma held that the amendment did not change the existing interpretation of the statute. It could not affect the rights of the parties here because the amendment was passed after the death of Odie Martin. 26 Am. Jur., Section 168, p. 106; *Busby* v. *Pierson*, 128 So.2d 516 (Ala.).

Title 84, Oklahoma Statutes Annotated, Section 213 (first), providing for descent and distribution in the event of intestacy, as far as applicable here, is as follows:

> "First. * * * If the decedent leave a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband

or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of represenation; * * *"

STATEMENT

Odie and Opal Martin owned and occupied, as their homestead, an 80-acre tract of land in Latimer County, Oklahoma. The record title was in Odie Martin. He died August 10, 1951, intestate, leaving his wife and two minor children as his heirs. A third child was born posthumously. No administration was had on his estate. Under Oklahoma law, the widow inherited a one-third interest in the fee, and the children, a two-ninths interest each, subject to the homestead right of the widow. The widow and children continued to live on and occupy the homestead after Odie Martin's death [R. 41(2)(3)(4)]. The land was leased for oil and gas purposes at the time of his death [R. 41(5)]. About 26 months thereafter this lease was surrendered.

On March 16, 1955, Opal Martin, individually, sold an oil and gas lease covering the 80 acres. Title to this lease vested in petitioner (R. 41-42). The lease is for a primary term of ten years and as long thereafter as oil or gas or either of them is produced. It provides for an annual delay rental of $80.00 (R. 78-79).

Petitioner paid Opal Martin the annual delay rental of $80.00 for each succeeding year to keep the lease in force in the absence of drilling [R. 42(6)].

In March, 1961, Opal Martin was appointed guardian of her three minor children by the County Court of Latimer County, Oklahoma. She obtained permission of the

court to sell and sold an oil and gas lease as such guardian covering the inherited interest of the children in the 80-acre probate homestead. E. S. Heyser, Jr., was the highest bidder at the public auction sale of the lease. The sale was subsequently confirmed and the lease executed by the guardian to Heyser [R. 43-44(7)]. This lease is shown beginning on page 78 of the record.

Petitioner then brought this suit to quiet its title to its oil and gas lease as against the guardianship lease sold to Heyser, contending that the widow had the right to the exclusive use and occupancy of the whole homestead, which included the right to lease the land for oil and gas purposes and to receive the rents, profits and income therefrom; that the rights of the minor children therein were postponed so long as the widow exercised her statutory right to the use and occupancy of the homestead and that the minor children have no present interest therein which their guardian could lease for oil and gas purposes. A determination of the death and heirship of Odie Martin was also sought to establish the devolution of the title upon his death.

The District Court quieted petitioner's title holding its lease valid as to the 80 acres and the guardianship lease ineffective. The Court of Appeals reversed the judgment of the District Court, holding that the execution of the lease by Opal Martin operated as an abandonment by her of the homestead rights in the minerals and vested the children, through their guardian, with the right to sell an oil and gas lease on their inherited interest in the land.

REASONS FOR GRANTING THE WRIT

1. Article 12, Section 1, of the Constitution of Oklahoma provides, in part, that a temporary renting of the homestead does not constitute an abandonment thereof. The Supreme Court of Oklahoma has held this provision applicable to a probate homestead. *Lusk* v. *Carter Oil Company of West Virginia*, 172 Okla. 503, 53 P.2d 656; *Rockwood* v. *St. John's Estate*, 10 Okla. 476, 62 Pac. 277; *Yost* v. *Cassell*, 208 Okla. 330, 255 P.2d 914.

In Oklahoma, an oil and gas lease is not an interest in real estate. *First National Bank of Healdton* v. *Dunlap*, 122 Okla. 288, 254 Pac. 729, 52 A.L.R. 126. It is an incorporeal interest, a profit *a prendre*. *Meeker* v. *Ambassador Oil Co.*, 308 F.2d 875 (10th Cir.).

Until there is development and production, an oil and gas lease conveys no interest in the land but only a right to use the surface for the purpose of exploration. *Aldridge* v. *Houston Oil Co.*, 116 Okla. 281, 244 Pac. 782; *Franklin* v. *Margay Oil Corp.*, 194 Okla. 519, 153 P.2d 486.

The execution of petitioner's oil and gas lease by the widow accomplished only a temporary renting of the homestead for oil and gas exploration and drilling purposes. *Garfield Oil Co.* v. *Champlin*, 78 Okla. 91, 189 Pac. 514; *Ellison* v. *Skelly Oil Co.*, 206 Okla. 496, 244 P.2d 832; Summers' Oil and Gas, Vol. 1-A, Section 136, beginning on page 281.

The Supreme Court of Oklahoma has consistently held that Oklahoma's constitutional and probate homestead laws should be liberally construed to effectuate their purposes.

Farmers Exchange Bank of Lindsay v. *Cutler*, 122 Okla. 255, 254 Pac. 95; *Hensley* v. *Maxwell*, 172 Okla. 21, 44 P.2d 60; *Lusk* v. *Carter Oil Company of West Virginia*, *supra*; *Mercer* v. *Mercer*, 365 P.2d 554 (Okla.); *Hembree* v. *Magnolia Petroleum Co.*, 176 Okla. 524, 56 P.2d 851; *In re Gardner's Estate*, 122 Okla. 26, 250 Pac. 490.

The widow is entitled to the exclusive use and possession of the whole homestead and to the rents, income and profits therefrom. *In re Gardner's Estate*, *supra*. Cash bonus money and delay rentals paid for and under an oil and gas lease constitute income from the land which belongs to the homestead occupant. *Strawn* v. *Brady*, 84 Okla. 66, 202 Pac. 505; *Harris* v. *Brady*, 136 Okla. 274, 277 Pac. 579; *Carter* v. *Rector*, 88 Okla. 12, 210 Pac. 1035; *Dixon* v. *Mapes*, 181 Okla. 376, 73 P.2d 1131.

Abandonment of the homestead will not be decreed except upon clear and convincing proof. *Lusk* v. *Carter Oil Company of West Virginia*, *supra*; *Mercer* v. *Mercer*, *supra*. The District Court held Opal Martin had not abandoned her homestead [R. 41(4), 45(4)]. There is no evidence of abandonment in the record.

The opinion of the Court of Appeals that Opal Martin abandoned her homestead rights in the minerals by executing petitioner's oil and gas lease is in direct conflict with Article 12, Section 1, of the Constitution; 58 Oklahoma Statutes Annotated, Section 311, and the cited cases.

The adoption by the Court of Appeals of Professor Kuntz' rule of "uncertainty," concerning the power of the homestead occupant or life tenant to grant a new lease, after termination of the lease which existed at the time

the estate began, runs contrary to what the Supreme Court of Oklahoma would be expected to hold in the light of its consistent liberal interpretation of the homestead laws of the State, the resolution of doubts in connection therewith in favor of the homestead occupant, the well established rule that abandonment of a homestead must be shown by clear and convincing proof, and the reiterated rule that the homestead occupant is entitled to the whole homestead and the rents, profits and income therefrom; also, the established doctrine that the right of the survivor to occupy and live upon the homestead is superior to the rights of co-heirs to a property interest in the estate, including minor children. *In re Gardner's Estate, supra; Mercer* v. *Mercer, supra; Lusk* v. *Carter Oil Co. of West Virginia, supra; Hembree* v. *Magnolia Petroleum Co., supra; In re Shailer's Estate*, 266 P.2d 613.

The Court of Appeals failed to follow constitutional and statutory provisions and cited decisions of the Supreme Court of Oklahoma decisive of this lawsuit.

2. The opinion of the Court of Appeals will create conflict and confusion in the law of titles to oil and gas leases covering probate homesteads. Oklahoma is one of the nation's largest producers of oil and gas. The oil and gas business is one of Oklahoma's largest industries. It has its roots in the leasing of lands for oil and gas exploration and drilling purposes.

The extent of the importance of Article 12, Section 1, of the Constitution of Oklahoma, and 58 Oklahoma Statutes Annotated, Section 311; as amended, to land titles and oil and gas leases may be seen in the large number of cases

cited in the annotations to the cited constitutional and stautory provisions and in West's Oklahoma Digest, Volume 7A, Title Homestead, Key Nos. 134 to 153, inclusive.

The opinion of the Court of Appeals should be reversed. To let it stand will cause and create confusion and conflict in titles to and the marketability of oil and gas leases covering probate homesteads in Oklahoma. There is ample Oklahoma constitutional, statutory and case law sustaining the judgment of the District Court, which the Court of Appeals should have followed and applied to this case. *Caroline M. Forsyth* v. *City of Hammond*, 166 U.S. 504; 41 L.Ed. 1095; *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199; *Byrd* v. *Blue Ridge Rural Electric Co-op, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed.2d 953.

CONCLUSION

The petition for a writ of certiorari should be granted so that Oklahoma constitutional, statutory and case law decisive of this case may be followed and applied; the conflict between Oklahoma law and the opinion of the Court of Appeals resolved; the confusion and resulting instability in titles to oil and gas leases covering probate homesteads which will result from the Court of Appeals' opinion avoided and such titles stablized and confirmed in

accordance with settled Oklahoma constitutional, statutory and case law of long standing.

Respectfully submitted,

LOUIS A. FISCHER,
P. O. Box 1766,
Ardmore, Oklahoma,
Attorney for Petitioner.

Of Counsel for Petitioner:

ELDON E. SCOTT,
Attorney at Law,
P. O. Box 747,
Dallas 21, Texas;
JOSEPH M. CULP,
Attorney at Law,
P. O. Box 1766,
Ardmore, Oklahoma;
F. LOVELL McMILLIN,
Attorney at Law,
P. O. Box 1766,
Ardmore, Oklahoma.

June, 1963.

APPENDIX "A"

FILED
United States Court of Appeals
Tenth Circuit
APR 22 1963
ROBERT L. CARTWRIGHT
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM — 1963

E. S. HEYSER, JR.; Opal Martin, individually, and Opal Martin, guardian of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, minors; and John B. Baumert, guardian ad litem of Andrea Pauline Martin, Maudie Dean Martin and Odie D. Martin, minors,

Appellants,

vs.

No. 7098

FRANKFORT OIL COMPANY, a division of Joseph E. Seagram & Sons, Inc., an Indiana corporation,

Appellee.

Appeal From the United States District Court for the Eastern District of Oklahoma

James M. May (Charles B. Tucker and John B. Baumert with him on the Brief) for Appellants.

Louis A. Fischl (Eldon E. Scott, Joseph M. Culp and F. Lovell McMillin with him on the Brief) for Appellee.

[APPENDIX]

Before MURRAH, Chief Judge, and BREITENSTEIN and SETH, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a judgment quieting appellee's title to an oil and gas lease, executed by the occupant of an Oklahoma probate homestead,[1] covering the entire mineral interest, and cancelling appellants' oil and gas lease, executed by the same person, as Guardian of her minor children, purporting to cover their mineral interest in the same tract of land. The case is here on diversity jurisdiction, and the material facts are stipulated.

Odie and Opal Martin owned and occupied, as their homestead, an 80 acre tract of land in Latimer County, Oklahoma, on which, as husband and wife, they executed an oil and gas lease. While the lease was in force, Odie Martin died intestate, leaving his widow and three minor children. The then existing oil and gas lease was later surrendered without any exploration or development. Almost two years thereafter, Opal Martin, as an individual, executed another oil and gas lease on the occupied homestead to R. D. Hamilton, who assigned it to appellee, Frankfort. Sometime later and while the Frankfort lease was in force, Frankfort suggested that Opal Martin petition the County Court for appointment as Guardian of her minor children, for the purpose of selling an oil and gas lease on the inherited mineral interest of her minor children in the homestead land. Opal Martin was duly appointed Guardian and did advertise and sell to the highest bidder the oil and gas lease, as provided by applicable Oklahoma law. Frankfort was not the successful bidder, and shortly after the sale brought this action to cancel the lease, contending that it was a cloud upon their title to the minerals under their lease from Opal Martin as

---

[1] Title 53 O.S. §311; 15 Okl. Law Rev. 130.

the homestead occupant. The Guardianship lessees cross-claimed to validate their lease.

The trial court's judgment validating the Frankfort lease and cancelling the Guardianship lease apparently rests upon the proposition that Opal Martin's admitted rights under Oklahoma law, to the exclusive use and full enjoyment of the probate homestead during occupancy, empowered her to grant an oil and gas lease on the homestead, for the purpose of realizing the ensuing rents and profits therefrom.

Unquestionably, the occupant of an Oklahoma probate homestead, like the holder of a life estate in lands, takes the land in the condition in which it was when the estate vested. And, the occupant is thus "entitled to all the rents and profits which may accrue from the lands by reason of minerals which may be produced from mines or wells existing at the time of the death of the testator, or which may be produced from mines or wells opened under authority of conveyances executed prio to the vesting of the * * * estate." Lawley v. Richardson, 223 P. 156. And see Hembree v. Magnolia Petroleum Co., 56 P.2d 851; Baze v. Scott, 106 F.2d 365; In Re Shailer's Estate, 266 P.2d 613, 18 ALR2d. §18, p. 98; and Kuntz Law Of Oil and Gas, Vol. I, §8.2, p. 174. This so called "open mine doctrine," apparently has its genesis in the historical concept that since a life tenant or probate homestead occupant takes the land in the condition that existed at the time of the vesting of the estate, she is entitled to use it as the grantor intended that it should be used.[2] Embracing this theory, the appellee takes

---

[2] In his recent work on the law of oil and gas, Professor Kuntz (Kuntz Law Of Oil And Gas, Vol. I, §8.2, p. 174) reviews the history of the open mine doctrine, with emphasis on the intention or contemplation of the grantor, as the underlying basis for upholding the right of the life tenant or homestead occupant to use the lands for all purposes to which they were devoted at the time of the death of the grantor and the vesting of the estate.

the position that the execution of the oil and gas lease prior to the death of the grantor operated to dedicate the land to the exploration and production of oil and gas, and that by the execution of the Frankfort lease, the widow merely "continued, extended and renewed the status which existed at the time of her husband's death." They suggest that the Frankfort lease is identical, except as to dates, to the former lease, and that it imposed no greater burden on the remaindermen and was, therefore, clearly within the lessor's right *to reap the rents and profits, as contemplated, and to which the land was dedicated when the homestead right accrued.*

Professor Kuntz has noted some "uncertainty" concerning the power of the homestead occupant or life tenant to grant a new lease, after the termination of the lease which existed at the time the estate began. It is suggested that "if emphasis be given to the grantor's intention to the effect that he intended that the land be dealt with as he has dealt with it, it would follow that the life tenant, acting alone, would have the right to give a valid lease after the termination of the existing lease, and would be entitled to all proceeds payable under such subsequent lease. If, on the other hand, emphasis be given to the factor that wells are to be drilled under the authority of an existing lease, which is the equivalent of an open mine, then it is apparent that such an authority for opening mines or drilling wells no longer exists after the termination of the outstanding lease, and the life tenant, acting alone, would not be able to lease again and enjoy the proceeds of a subsequent lease." Kuntz Law Of Oil And Gas, Vol. I, p. 177.

We resolve the "uncertainty" against the power of the homestead occupant to grant a new lease, covering the mineral interest in the homestead, after the termination of the lease which was in existence when the homestead estate vested. No case is cited, and we have found none, to support the authority of the homestead occupant to grant an oil and

gas lease, simply because the land had been previously devoted or dedicated to the exploration for oil and gas by a lease, in existence at the time of the vesting of the probate homestead estate. The historical rule against waste by a life tenant or a homestead occupant seems to militate against the opening of new mines or the drilling of new wells, after the vesting of the estate, and to confine new exploration to authority expressed or clearly implied at the time of the vesting of the estate. See: American Law of Property, Vol. I, §2.16, p. 136 and Vol. V, §20.6, p. 89. Indeed, the Oklahoma courts speak only of the right of the homestead occupant to "receive, collect and use in her own right, the royalties arising from oil and gas wells developed under a lease executed prior to the death of the deceased." Syllabus of Lawley v. Richardson, supra. And see also: Lusk v. Carter Oil Co. of West Virginia, 53 P.2d 656. The Oklahoma court has also stated the law of the State to be that the "*production and sale of minerals by the homestead occupant or his lessee, under authority not existing at the time the right of occupancy vests does constitute waste, and such may be* enjoined by the other heirs or their assigns." Hembree v. Magnolia Petroleum Co., supra.

Upon the death of the intestate, the land passed to the heirs at law—an undivided one-third interest to the surviving spouse, and an undivided two-thirds interest to the surviving children. The land was burdened with an outstanding oil and gas lease, with the exclusive right of the probate homestead occupant to the rents and profits to be derived therefrom. Upon the surrender of the outstanding oil and gas lease, all rights thereunder reverted to the heirs, subject of course, to the exclusive right of homestead occupancy. During the homestead occupancy of the mineral estate, the co-tenants are powerless without the assent of the homestead occupant, to give a lease, for the simple reason that they have no right to possession. Professor Kuntz suggests, however, that "all homestead rights in the min-

erals may be abandoned and lost by the homestead occupant's purported conveyance of the minerals, although the surface is still occupied as a homestead." Kuntz Law Of Oil And Gas, Vol. I, §8.5, p. 192. And this is undoubtedly the law in Oklahoma. See: Hembree v. Magnolia Petroleum Co., supra.

It would seem that the conveyance of an oil and gas lease by the homestead occupant, with the right of exploration and development, would operate as an abandonment of the homestead rights in the minerals, quite as effectively as a conveyance of the minerals, or an interest therein. Either conveyance carries with it the right to go upon the land to explore or produce the minerals.[3] This being so, the conveyance of the oil and gas lease by the homestead occupant to Frankfort "opened the way for the rights of all other co-tenants to immediately attach to all the minerals beneath the surface of the land," as co-tenants of the homestead occupant. Hembree v. Magnolia Petroleum Co., supra, p. 858. The Guardianship lease, covering an undivided two-thirds interest in the minerals was, therefore, valid, subject only to the exclusive right of occupancy of the surface in the homestead occupant; the two lessees became co-tenants in the leasehold estate, and the rules of cotenancy apply.

To be sure, the homestead occupant retained the exclusive right of occupancy of the surface, but by the execution of the oil and gas lease to Frankfort, she necessarily relinquished so much of those rights as is requisite to the full enjoyment of the leasehold rights granted, and having

---

[3] The appellee suggests that the appellants do not contend that the homestead occupant abandoned her homestead rights in the mineral estate, and say that in any event, the district Court found against them on this point and that the findings is not challenged. We think, however that the point is fundamental to the issues in this lawsuit and that the appellants have raised it and argued it.

thus relinquished them to her lessee, she did as much for the lessees of her co-tenants. Any other ruling would repudiate the rights expressly granted and necessarily implied in the leasehold estates.

We hold the two leases valid and effective to cover the respective interests of their co-tenant lessors in the mineral estate underlying the homestead, and that the lessees are cotenants with the equal right to enter upon the lands for the purpose of exploiting their leasehold rights, subject of course, to the surface rights of the homestead occupant.

The judgment is REVERSED.